IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. ~~326~~ 89

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND LOCAL UNION 5895, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD

AND

CARRIER CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION FOR THE CARRIER CORPORATION.

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OPINION BELOW.

The petition's references (Pet., pp. 1-2) to the opinion below are accurate.

JURISDICTION.

The petition's statement (Pet., p. 2) relative to the jurisdiction of this Court is accurate.

QUESTION PRESENTED.

Whether Section 8(b)(4)(B)(i) of the Labor Management Relations Act prohibits a union, engaged in primary picketing at an industrial plant, from inducing employees of a railroad—by picketing the railroad's property which adjoins or is nearby that of the industrial plant—to engage in a strike with the object of forcing the railroad to cease transporting products of the industrial plant.

STATUTES INVOLVED.

The petition's citation and quotation (Pet., pp. 2-4) of the statutes involved is accurate except that the Act referred to therein is more properly cited as the "Labor Management Relations Act, 1947", 61 Stat. 136, as amended, 29 USC 141(a) and the text of Section 8(b)(4)(B), as amended, thereof appears at 73 Stat. 542-543, 29 USC 158 (b)(4)(B).[1]

Also pertinent to the question presented is the so-called "publicity proviso" to Section 8(b)(4)(B), which proviso was added by Section 704 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 543. The proviso is quoted at page 14 herein.

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1. The petition's quotation (Pet., p. 3) of the (ii) provisions of said Section 8(b)(4)(B) is surplusage in that said petition's statement of the question presented (Pet. p. 2) pertains solely to "inducing" secondary employees; which inducing is proscribed by the (i) provision of 8(b)(4)(B); and does not encompass the violations of Section 8(b)(4)(ii)(B), based upon the union's blocking of access to the railroad's property and its threats to railroad employees at the railroad properties, found by the Court of Appeals for the Second Circuit (Appendix A to Pet., pp. 26-49).

STATEMENT OF THE CASE.

A. The Facts.

On and after March 2, 1960, in support of an economic strike against Carrier Corporation (hereinafter called "Carrier"), the petitioning unions picketed each of the eight plant entrances at Carrier's Thompson Road plant in Syracuse, New York. The picketing was accompanied by threats and violence on the part of the unions (J. A. 316; 362-363; G. C. Exh. 9; J. A. 51, 311).

The plant fronts on the east side of a north-south highway known as Thompson Road. Behind Carrier's facilities is a plant of the General Electric Company. South of and adjacent to the two plants are east-west railroad tracks of the New York Central Railroad on a right of way owned by the railroad. Immediately south of and adjacent to the railroad right of way are two other industrial plants, both fronting on Thompson Road.

The railroad tracks described above serve all four of the above-described plants by a series of spurs and are enclosed by a chain-link fence, which also encloses the Carrier property. In the fence is a railroad gate, also fronting on the east side of Thompson Road, through which trains enter upon and leave the sidings and spurs lying on the railroad property. The railroad gate is on the railroad's right of way and when not being used by the railroad the gate is kept locked, with a key in the possession of railroad personnel. Carrier employees are not permitted access to Carrier property through the railroad gate and right of way (G. C. Exh. 9; J. A. 51, 311; J. A. 319, 363).[2]

2. The petition's statement of the facts is misleading in that it makes it appear that this railroad gate was but a plant gate of Carrier, the primary employer. Thus, the petition states (Pet., p. 4), that the union "picketed the various entrances to the plant premises. One of the entrances picketed . . . is that which is used by the New York Central Railroad in making pickups and deliveries at Carrier."

Although the railroad employees involved herein were not represented by the unions, petitioners herein, the railroad gate described above was picketed on or about the commencement of the strike (J. A. 81, 82, 316, 319), and was the scene of several incidents, the most serious of which took place March 11, 1960. On that date a train, manned by nonsupervisory railroad employees, was stopped at the gate by the pickets and was not permitted to enter until the trainmaster assured the pickets that the Carrier plant would not be served. After switching cars for the other plants, the train—manned this time by railroad supervisors—again attempted to enter upon railroad property through the railroad gate. Thirty to sixty massed pickets—both on the east *and west* sides of Thompson Road—sought forcibly to restrain the train's movements. Pickets who were lying on the tracks in front of the train had to be removed physically by police officers. A staff representative of the union drove his automobile onto the track during the switching operation and it, too, had to be removed by police officers before the train could continue. An attempt—attributed to the unions by the Trial Examiner—also was made to damage the train by greasing the track and setting the switch in such a manner as to derail the train. Also, the railroad supervisor in charge of the train was challenged by a union picket to get down off the engine "for the purpose of getting my block knocked off" (J. A. 82, 86-94, 136, 316, 319-323; G. C. Ex. 6, 7, J. A. 52, 309, 310).

B. The Decision of the Board.

Upon the foregoing facts, the Trial Examiner concluded that the unions had violated both Section 8(b)(4)(i) and (ii)(B) and 8(b)(1)(A) of the Act (J. A. 325, 327, 335-337, 340). The Board, in agreement with the Trial Examiner

found violations of Section 8(b)(1)(A) of the Act (J. A. 362, 363).

The Board majority, however, reversed the Trial Examiner with respect to the violations of Section 8(b)(4) and dismissed the portions of the complaint relating thereto on the ground that *Local 761, Int'l Union of Elec. Workers (General Electric Co.)* v. *N. L. R. B.*, 366 U. S. 667 (1961) was dispositive (J. A. 363-364, 368). The Board majority opinion likened the railroad's gate to a separate gate of a single employer and held that, because the services performed by the railroad were services rendered in connection with the normal operations of Carrier, the Act was not violated (J. A. 365-366). Member Rodgers dissented, arguing that the majority decision was in direct contravention of the 1959 amendments to the Act; that reliance on *Local 761 (General Electric)* was misplaced because property of a secondary employer rather than the "reserved gate" of a primary employer was involved; and that the picketing was peaceful in *Local 761*, rather than accompanied by threats and violence as was true in the instant case (J. A. 369-371).

C. The Decision of the Court of Appeals.

The Court of Appeals for the Second Circuit reversed the decision of the Board as it related to Section 8(b)(4)(i) and (ii)(B), Chief Judge Lumbard dissenting.

After a detailed analysis of the development of secondary boycott law (App. A to the Pet., pp. 26-42), the court summarized the pattern of pertinent decisions as one that firmly identified the objects of legitimate primary activity as reaching and publicizing and communicating to primary employees; and that the emergent doctrine required that picketing be conducted in such a manner and at such a place as to minimize the impact on neutral employees insofar as

this could be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees (App. A to the Pet., pp. 42-43). The court added (App. A to the Pet., p. 43):

> The relevance of these principles to the issue before us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and *sole*, objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *DiGiorgio Fruit Corp.* v. *N.L.R.B.*, 191 F. 2d 642 (D. C. Cir., 1951), here involved no such redemptive feature. The actions of the union were thus in violation of §§ 8(b)(4)(i) and (ii)(B) of the Act.

The Court of Appeals went on to note (App. A to the Pet., pp. 46-47) that this Court in *Local 761, Int'l. Union of Elec. Workers (General Electric Co.)* v. *N.L.R.B.*, 366 U. S. 667 (1961), found picketing at a reserved gate on and to an employer's primary premises to be violative of section 8(b)(4)(B) where such gate was exclusively used by employees of neutral employers; but that such finding of illegality was limited to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. The court added (App. A to the Pet., pp. 47-48):

> In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing *at the premises of the primary employer*. *Local 761*

(General Electric), supra, at 679, 681. (Emphasis by the court)

In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made.

We do not find in *General Electric* a policy of the Supreme Court to exempt from the Act's proscriptions all union attempts to keep deliveries from being made to a struck plant, wherever and however such attempts are made. Yet it is this position for which the Board now earnestly contends. Were we to accept such a doctrine, however, we should not be able to distinguish attempts to prevent deliveries from attempts directly to interfere with other business relations between the struck employer and his suppliers or customers. Congress might have written § 8(b)(4) to apply only to union interference with business relations between a struck employer's suppliers and customers and *their* suppliers and customers. It did not do so, nor have the courts failed to find violations of the Act where union activities directly interfered with relations between a struck employer and secondary parties dealing with him. See, e.g., *Local 1976, United Brotherhood of Carpenters (Sand Door & Plywood Co.)* v. *N.L.R.B.*, 357 U. S. 93 (1958).

We do not read *Local 761 (General Electric Co.)* v. *N.L.R.B., supra,* to conflict with our disposition of the case at bar.

The dissent (App. A to the Pet., pp. 48-60) would—on the facts of this case—disregard both the locus of the picketing and the ownership of the property picketed and find the picketing not to be violative of section 8(b)(4)(B) since the picketing "was designed to accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished" (App. A to the Pet., p. 58).

ARGUMENT.

1. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, BELOW, IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Petitioners contend (Pet., p. 10) the decision of the court below to be in direct conflict with the decision of this Court in *Local 761, International Union of Electrical Workers* v. *N.L.R.B.*, 366 U. S. 667.

The contention is erroneous and proceeds from a misconception of both the facts and issues in *Local 761*. *Local 761* involved picketing at a "reserved gate" at and to the premises of a primary employer. It was not concerned with picketing—as was done here—at the premises of a neutral employer. Moreover, the issue in *Local 761*—as stated by Mr. Justice Frankfurter, speaking for the court—was whether the Board may apply those standards for controlling picketing at sites *used in common by more than one employer* evolved in *Sailor's Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), "so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises" (366 U. S. 667, 680). The *Moore Dry Dock* standards, as acknowledged by this Court in *Local 761* (366 U. S. 667, 679), were designed to limit the effects of such common situs picketing to employees of the struck employer.

The decision of this Court in *Local 761* resolved the issue thus posed by holding, in effect, that the *Moore Dry Dock* limitations on picketing would not be applied to picketing of reserved gates on primary premises where such gate

was used by employees of neutral employers who performed work related to the normal operations of the primary employer. In other words, this Court, in *Local 761*, wrote an exception to *Moore Dry Dock* where the picketed premises were those of the primary employer and where the work performed by the neutral employees was related to the normal operations of the primary employer.

Contrary to petitioners' assertion (Pet., p. 11), however, this Court in *Local 761* did not extend such exception to all *Moore Dry Dock* cases, i.e., to common situs picketing at a secondary employer's premises. To do so would obliterate the *Moore Dry Dock* principles since certainly the work of neutral employees at the secondary premises would almost always—assuming any sort of a continuing business relationship between the primary and secondary employer—have a relation to the normal operations of the primary employer.

To further extend *Local 761's* exception to *Moore Dry Dock* to this case would be an even greater *non sequitur* to the rationale of *Local 761*. Here the picketing was directed purely at secondary employees and at a purely secondary site. It was not a common site. It was not used by primary employees. Under such circumstances, and as held by the court below (App. A to the Pet., p. 47), *Local 761's* special policy of greater latitude for picketing *at the primary employer's premises* does not come into play, and no distinction based on the work performed by the neutral employees need be made.

Finally, it is submitted that when one looks to the language of section 8(b)(4)(B), petitioners' conduct is a classic violation thereof. And as the court below observed (App. A to the Pet., p. 46), "After all, the language found in a statute is not wholly irrelevant to its proper construction."

2. THE DECISION OF THE U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

Petitioners' contention (Pet., p. 14) that the holding of the court below is in conflict with decisions of Courts of Appeal for the Eighth and District of Columbia Circuits again fails to distinguish between picketing at secondary premises, picketing at common premises and picketing at primary premises.

Petitioners cite *Seafarers International Union (Salt Dome Production Co.)* v. *N.L.R.B.*, 265 F. 2d 585 (D. C. Cir., 1959), in illustration. Both the court below and the court in *Salt Dome* agree that in *common situs* cases the objective of the picketing determines its legality. The court in *Salt Dome*, however, would not infer an illegal object unless the picketing had a greater impact on the neutral employer than would picketing at the primary premises. But the facts in *Salt Dome* are peculiar and totally unlike the instant ones. Here the picketing was at a purely secondary premises. In *Salt Dome* the union was picketing the primary employer's vessel which was berthed at a secondary premises and from which vessel the primary employer had removed its employees. In sum, the court in *Salt Dome* found the vessel to be the primary situs of the dispute and found the picketing not violative of section 8(b)(4)(B). Had there been a contrary holding in *Salt Dome*, the union would have been deprived of the right to do any primary picketing. This is not the case here, and the court in *Salt Dome* took care that its holding should not extend beyond the peculiar facts there presented by stating, "We do not intend here to make a ruling broader than the case before us" (265 F. 2d 585, 590). Accordingly, the most that can be said for petitioners'

contention on this point is that perhaps the court below would disagree with the District of Columbia Circuit on the facts in *Salt Dome*. It cannot be said that the District of Columbia Circuit would disagree with the court below on the instant facts.

Other purported conflicts with the court below are even less persuasive. In *DiGiorgio Fruit Corp.* v. *N.L.R.B.*, 191 F. 2d 642 (D.C. Cir., 1951), cert. denied, 342 U. S. 869, cited by petitioners (Pet. p. 14), a union took disciplinary proceedings within the union against drivers who crossed its lawful primary picket line. The court, viewing the disciplinary proceedings as ". . . directed solely toward maintaining the observance of its primary picket line . . ." found such activity primary in nature.

Petitioners contend the proceedings against the drivers in *DiGiorgio* were not a necessary part of the union's appeal to primary employees and thus contrary to the holding in the instant case (Pet., pp. 15, 16). While it would be more accurate to state the issue in terms of the "incidental" involvement of neutral employees rather than the "necessary part" of an apeal to primary employees, the question remains one of fact as to whether the particular activity is incidental to the pursuit of legitimate objectives. Although one might reasonably disagree with the District of Columbia Circuit's resolution of the facts in the *DiGiorgio* case, it apparently felt that activity which strengthened the desire to honor the existence of a primary picket line, on the part of those who came in contact with that line, was a proper incident of that picketing. However, observance of a primary picket line is not at issue in the instant case. Here, it is the union's secondary picketing at the premises of a secondary employer which the court below found unlawful; picketing designed to augment—not induce observance of—its primary picketing.

In another case, alleged by petitioners to be in conflict with the decision of the court below (Pet., pp. 17-18), the District of Columbia Circuit permitted the picketing union to tell ". . . employees of neutral trucking concerns, over the telephone, that the plant was picketed, expressly or impliedly asking them to respect the picket line . . ." *Chauffeurs Local Union No. 175* v. *N.L.R.B. (McJunkin Corp.)*, 294 F. 2d 261 (D.C. Cir., 1961). The court in *McJunkin* construed such telephone calls to be a normal incident of peaceful primary picketing and found no violation. Again, it may be seriously questioned whether the finding is correct, inasmuch as, if carried to its logical conclusion, it would permit inducement of neutral employees at any location, so long as the appeal was to honor the primary picket line. However, be that as it may, in *McJunkin*, as in the *DiGiorgio* case, the District of Columbia Circuit was concerned with the observance of a lawful primary picket line at the primary employer's place of business. Here, on the other hand, the picket line in question is at the secondary employer's premises. As the court below said, with reference to the *McJunkin* case, in its amended decision:

> The Court's opinion is a one paragraph per curiam and the opinion may have more importance than is presently evident, but it would appear that the results that the District of Columbia Court reached (even though relying upon a distinction that appears to be without a difference) are consistent with the results we reach here, for they held, as we do, that it is an unlawful objective for a Union to induce employees of a secondary employer to engage in a secondary boycott when the inducement so to do is conducted, as here, on the secondary employer's premises. (App. B to the Pet., p. 62.)

The final court of appeals case claimed by petitioners to be in conflict with the court below is the Eighth Circuit

decision in *Local 618* v. *N.L.R.B.* (Site Oil Co.), 249 F. 2d 332 (8th Cir., 1957). There, in a case admitted by petitioners (Pet. p. 18) to be distinguishable from the instant facts on the ground that the union's appeals to neutral employees were made on the primary employer's premises, the court refused to find Section 8(b)(4) violated when the union continued to picket a filling station being remodeled, even though the employees of the primary employer left the site and only employees of independent contractors remained. The Eighth Circuit specifically emphasized that the strike was at the business situs of the primary employer, treating the case as a common situs problem throughout. Also, the Eighth Circuit relied heavily on *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, where this Court found no illegality in inducement aimed at *individual*, as distinguished from *concerted* activity. This concept, as noted by the court below (App. A to the Pet., pp. 36-37) was eliminated in the 1959 amendments by striking the word "concerted" from the opening subparagraph of the section.

Not one of the cases cited by petitioners as in conflict with the decision of the court below involves picketing at the separate premises of a separate employer. To demonstrate a conflict with these cases, each of which interpreted Section 8(b)(4) prior to the 1959 amendments, petitioners must show that activity at a primary picket line is the equivalent of picketing at a secondary employer's premises. Petitioners must also show that appeals to honor a primary picket line, whether through telephone calls or union disciplinary proceedings, are the equivalent of a picket line at a neutral employer's premises. It is respectfully submitted that the statute itself effectively precludes either such showing, particularly since the 1959 amendments to the Act.

Those amendments, which were of considerably greater scope than would appear from petitioners' reference to them (Pet., p. 11), implemented the frequently expressed Congressional intent to eliminate all secondary boycotts and, both through language changes and legislative history, clarified the distinction between primary and secondary activity. Thus, for example, the so-called "publicity proviso" was added to Section 8(b)(4), reading as follows:

> Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution (29 U.S.C. 158(b)(4), as amended, 73 Stat. 543).

It is submited that the addition of said proviso would be superfluous if the separate situs of the picket line is not controlling or if inducement of neutral employees away from the primary picket line is proper. Surely, Congress would not have found it necessary to except such publicity from the Section 8(b)(4) prohibitions if appeals to neutral employees away from the site not to cross the primary picket line were permissible. And even the narrow exception in the publicity proviso is not extended to picketing of any type away from the primary employer's premises.

From the foregoing, Carrier respectfully submits the cases cited as in conflict with the court below are readily distinguishable and are, in fact, not inconsistent in result.

3. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DOES NOT PRESENT A QUESTION OF FEDERAL LAW TO WHICH THIS COURT NEED ADDRESS ITS ATTENTION.

Petitioners contend (Pet., p. 20) that the decision of the court below raises a question of whether an adjoining or nearby railroad siding can be picketed and that "The question cries for an answer and only this Court can answer it." Relating the question to the facts of this case, the question becomes whether the proscriptions of Section 8(b)(4) extend to the inducement of railroad employees by a picket line at premises purely secondary but adjacent or nearby to primary premises.

The question was answered in the affirmative by Congress in its 1959 amendments to the Labor Management Relations Act when it formally extended the protection of Section 8(b)(4) to railroad employees. *N.L.R.B. Legislative History of Labor Management Reporting and Disclosure Act of 1959*, pp. 1079, 1522-1523, 1581, 1706-1707, 1712, 1857.

Previous to the 1959 amendments the question was answered in the affirmative by such cases as *International Rice Milling Co.* v. *N.L.R.B.*, 183 F. 2d 21 (5 Cir. 1950); *Great Northern Railway Co.* v. *N.L.R.B.*, 272 F. 2d 741 (9 Cir. 1959); *W. T. Smith Lumber Co.* v. *N.L.R.B.*, 246 F. 2d 129 (5 Cir. 1957).

And finally, the question was decided in the affirmative by the court below in a manner completely in accord with the evolution of secondary boycott law over the years.

3. No review sought on this point, 341, U. S. 665, n. 2 (1951).

In view of the foregoing, Carrier submits that the law of secondary boycotts, insofar as it concerns this case, is now settled and that petitioners' dissatisfaction is more with the substance of the law than with its clarity.

Conclusion.

For the reasons stated, the petition for writ of certiorari should be denied.

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